BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ESTEFANA GALAN Claimant	)	
V.	)	Docket No. 1,073,660
VIA CHRISTI HEALTH, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Self-insured respondent requested review of the August 1, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Dennis L. Phelps of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr. of Wichita, Kansas, appeared for respondent.

The ALJ found the accident date of claimant's injury by repetitive trauma to be February 18, 2015, an employer/employee relationship existed at the time of the injury, and claimant provided timely notice to respondent. The ALJ determined claimant met her burden of proving she sustained an injury by repetitive trauma to her bilateral upper extremities.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 31, 2016, Preliminary Hearing and the exhibits, and the transcript of the July 19, 2016, Preliminary Hearing, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the date of claimant's alleged injury by repetitive trauma is November 17, 2015. Respondent maintains claimant failed to provide timely notice and did not have an employee/employer relationship on the date of injury. Further, respondent argues claimant failed to sustain her burden of proving she suffered an injury by repetitive trauma.

Claimant contends the ALJ's Order should be affirmed.

The issues for the Board's review are:

1. Did claimant suffer an injury by repetitive trauma arising out of and in the course of her employment with respondent?

2. What is claimant's date of accident?

3. Did claimant provide timely notice to respondent?

FINDINGS OF FACT

Claimant worked for respondent as a cook for approximately 13 years. Claimant's primary job duties included continuously peeling, chopping, and cutting foods for the majority of each eight-hour shift. Claimant testified she performed this job from the time she was hired until she underwent surgery on February 18, 2015.

In 2011, claimant was treating with neurologist Dr. Michael Vesali for an unrelated condition. On July 7, 2011, Dr. Vesali conducted an EMG/nerve conduction study of claimant's bilateral upper extremities, finding evidence of moderate to severe bilateral median entrapment neuropathy at the wrists. Dr. Vesali recommended conservative treatment, with surgical evaluation to be considered if said treatment was ineffective. On his office note of August 15, 2011, Dr. Vesali listed a diagnosis of carpal tunnel syndrome (CTS). Dr. Vesali did not provide work restrictions. It is unclear from the record whether Dr. Vesali treated claimant's CTS complaints.

Dr. Robert Gonzalez, claimant's primary care physician, examined claimant on May 31, 2013. Although the reason for the appointment is listed as "hand pain," Dr. Gonzalez' notes refer only to treatment of an unrelated matter.[1] Claimant returned to Dr. Gonzalez on December 13, 2013, again with complaints of hand pain. Dr. Gonzalez ordered x-rays of claimant's right wrist, which were read to reveal mild degenerative changes with no acute process. Dr. Gonzalez assessed claimant with right hand pain. He recommended claimant treat with anti-inflammatories and suggested she immobilize her wrist during physical activities.

On January 13, 2014, claimant returned to Dr. Gonzalez with complaints of hand and neck pain, worse while working. Dr. Gonzalez suggested to claimant she may be suffering from peripheral neuropathy and assigned work restrictions of no lifting greater than 10 pounds. He provided medication and recommended a nerve conduction study should claimant's symptoms not improve. Claimant testified she provided her restrictions to respondent, but her work did not change at that time:

[1] P.H. Trans. (Mar. 31, 2016), Cl. Ex. 6 at 9.

> Q. So when you got that ten-pound lifting restriction from Dr. Gonzalez in January of 2014, did you have any modification done at [respondent] to any of your job duties?
>
> A. No.
>
> Q. Did you continue to do those same repetitive work tasks that you described previously with the cutting and the peeling and the chopping of the fruit and vegetables?
>
> A. Yes.[2]

Dr. Gonzalez noted bilateral hand pain on November 24, 2014. Claimant reported increased discomfort in her hands, especially when performing repetitive motions requiring wrist flexion. She indicated using a wrist brace with mixed results. Dr. Gonzalez told claimant she was most likely suffering from CTS and referred her to orthopedic surgeon Dr. Prince Chan.

Dr. Chan first examined claimant on December 5, 2014. Claimant complained of bilateral hand numbness and tingling. Dr. Chan ordered a nerve conduction study, which revealed mild bilateral CTS. Dr. Chan noted claimant's symptoms were severe and recommended she undergo a carpal tunnel release.

Claimant testified she and her daughter-in-law went to respondent's human resources department in late January 2015:

> Q. And when you went to Human Resources in late January of 2015, did you report to them that you were having these problems in your hands and that Dr. Chan wanted to do a surgery and that you wanted [respondent] to turn this matter over to their Workers' Compensation Department?
>
> A. Yes.
>
> . . .
>
> Q. Okay. After reporting that to [respondent] that you wanted to turn this matter in as a Workers' Compensation injury in late January of 2015, did you hear anything further from [respondent] about them turning the matter over to their Workers' Compensation people?
>
> A. No.[3]

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[2] P.H. Trans. (July 19, 2016) at 18-19.

[3] *Id*. at 21-22.

Claimant testified she continued to perform her regular job duties until February 18, 2015, the date of her left carpal tunnel release with Dr. Chan. Following surgery, Dr. Chan took claimant off work, with restrictions of no lifting over three pounds, no use of her injured hand, and no food handling. Dr. Chan indicated claimant could return to working light duty on March 6, 2015. Claimant stated she was placed in an accommodated position upon her return to work. Claimant testified her duties were essentially the same, with less cutting and chopping.

Dr. George Fluter, a board certified physiatrist, examined claimant on November 17, 2015, at her counsel's request. Claimant complained of intermittent dull, burning pain in her left hand and wrist. Dr. Fluter reviewed claimant's history, medical records, and performed a physical examination. He diagnosed bilateral upper extremity pain/dysesthesia, bilateral upper extremity repetitive use/cumulative trauma disorder, and bilateral CTS. Dr. Fluter recommended claimant have temporary restrictions and conservative treatment. He wrote:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported repetitive work-related activities involving the upper extremities. These activities are over and above those associated with routine activities of daily living.
>
> . . .
>
> The prevailing factor for the condition and the need for medical evaluation/treatment is the reported repetitive work-related activities involving the upper extremities.[4]

Board certified orthopedic surgeon Dr. Pat Do examined claimant on June 1, 2016, for purposes of a court-ordered independent medical evaluation. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Do diagnosed right wrist CTS. Dr. Do recommended temporary work restrictions and conservative treatment. He noted claimant would need a right wrist carpal tunnel release should conservative treatment prove ineffective. Dr. Do opined:

> Within a reasonable degree of medical probability, if her described work activities for the last 13-14 years cutting, [peeling], and chopping fruits and vegetables at [respondent] is true, then that is the prevailing factor in her current need for treatment for her right carpal tunnel syndrome and any kind of resulting impairment.[5]

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[4] P.H. Trans. (Mar. 31, 2016), Cl. Ex. 1 at 5.

[5] Do IME (June 1, 2016) at 2.

Claimant continues to work for respondent in a modified position.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2014 Supp. 44-508(f) states, in part:

(2)(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(e) states:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be

construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2014 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

1. Did claimant suffer an injury by repetitive trauma arising out of and in the course of her employment with respondent?

Claimant testified that, for approximately 13 years, her duties included peeling, chopping, and cutting fruits, vegetables and meats for most of her eight-hour shift. Claimant's description of her work activities was accepted by the ALJ and repeated in the ALJ's Order. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.[8]

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[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2015 Supp. 44-555c(j).

[8] See *Garner v. Kitselman Construction, LLC,* No. 1,069,084, 2016 WL 3208233 (Kan. WCAB May 31, 2016).

Dr. Do recorded a work history similar to that recorded by the ALJ. Dr. Do opined that, assuming an accurate work history, claimant's work activities were the prevailing factor causing her right carpal tunnel syndrome. Dr. Fluter also wrote claimant's repetitive work activities were the prevailing factor causing her upper extremity problems. There are no medical opinions in the record that controvert the causation opinions of Drs. Fluter and Do.

Based upon claimant's testimony and the opinions of Drs. Do and Fluter, the undersigned finds claimant suffered an injury by repetitive trauma arising out of her employment with respondent.

2. What is claimant's date of accident?

The ALJ found the date of injury by repetitive trauma to be February 18, 2015. Respondent argues the correct date is November 17, 2015. The earliest date of injury by repetitive trauma revealed in the evidence presented is the date the claimant was placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma by Dr.Chan. Dr. Chan placed claimant on restricted duty for her work related injuries on February 18, 2015.

Respondent argues that February 18, 2015, cannot be the correct date of injury by repetitive trauma because claimant had not been advised the condition was work-related by that date. Only K.S.A. 44-508(e)(3) contains a requirement that the injured worker be advised the condition is work-related. Subsection (e)(2) only requires the injured worker to be placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma. There is no mention of employee knowledge in K.S.A. 44-508(e)(2).

The undersigned finds claimant suffered an injury by repetitive trauma on February 18, 2015. Based upon this finding, respondent's argument that there was no employee/employer relationship has no merit.

3. Did claimant provide timely notice to respondent?

Based upon the foregoing, claimant was required to provide notice within 20 calendar days from February 18, 2015, which was March 10, 2015. Claimant testified that in January of 2015, she told Margie at respondent's human resources office that Dr. Chan wanted to do surgery and she wanted the matter turned over to the workers compensation department. A worker who sustains an injury by repetitive trauma may provide notice before the date of injury.[9]

[9] *Gilkey v. State of Kansas*, No. 1,066,859, 2016 WL 453036 (Kan. WCAB Jan. 26, 2016); *Whisenand v. Standard Motor Products,* No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012).

Claimant's testimony regarding notice is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[10] The undersigned finds claimant gave notice in compliance with K.S.A. 2014 Supp. 44-520.

CONCLUSION

Claimant suffered an injury by repetitive trauma arising out of her employment with respondent. The date of claimant's injury by repetitive trauma is February 18, 2015. Claimant gave timely notice of her injury to respondent in compliance with K.S.A. 44-520.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Ali Marchant dated August 1, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Ali Marchant, Administrative Law Judge

[10] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).